In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-175

BENJAMIN FEIN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 73-5115

LARRY KESSLER AND MELVIN HOFFMAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioners challenge the validity of court-ordered electronic surveillances on the ground that proper procedures were not followed within the Department of Justice for the submission to the court of the applications for the surveillance orders and on the ground that the affidavits supporting the applications did not comply with 18 U.S.C. 2518(1)(c). They also contend that 18 U.S.C. 1955 is unconstitutional as a bill of attainder and that in any event they could not validly be convicted of conspiring to violate that statute.

After a jury-waived trial in the United States District Court for the Southern District of New York, petitioners and others were convicted of conspiring to conduct an illegal gambling business in violation of 18 U.S.C. 1955 and 371. A second count of the indictment, charging petitioners with a substantive violation of 18 U.S.C. 1955, was severed prior to trial and subsequently dismissed.

Petitioners Fein, Weiss, Liguori, Kessler and Hoffman were fined $1,000 and sentenced to a two year term of imprisonment with all but sixty days suspended, such confinement to be followed by a two year probation term; petitioner Marconi was fined $3,500, given a suspended sentence and placed on probation for two years; petitioners Hirsch and Cantor were fined $1,000, given two year suspended sentences and placed on probation for two years; petitioner Shapiro was fined $1,000, given a two year suspended sentence and placed on probation for one day; petitioner Tanenbaum was fined $100, given a one year suspended sentence and placed on probation for one year. The court of appeals affirmed without opinion (Fein Pet. App. A1-A2).

The facts, which were based primarily on two court ordered surveillances and which were stipulated to at trial, revealed that between August 1971 and January 1972, petitioners and ten others conducted an illegal gambling business which included taking bets on telephones from runners and individual customers, taking bets through the use of an answering service and "laying off" bets with other gamblers (App. A210-A219; Fein Pet., p. 11).[1]

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[1] "App." refers to the appendix below, a copy of which is being lodged with the Clerk.

1. The surveillance evidence in this case was obtained from two court authorized surveillances conducted pursuant to Title III, Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. 2510-2520). The general procedure under which the applications for the wire interception orders were authorized to be submitted is set forth in our brief and petition in *United States* v. *Giordano,* No. 72-1057, certiorari granted March 26, 1973. In the instant cases the government showed by affidavits that the surveillance applications were personally approved by then Attorney General John N. Mitchell who personally initialed an authorization memorandum on December 1, 1971 for the first surveillance, and orally approved a second authorization on December 28, 1971.

Under the standard procedure, after approval in the Attorney General's office, letters were dispatched to the attorney in the field notifying him that he was authorized to apply for the surveillance orders. These letters were sent over the name of Acting Assistant Attorney General Henry E. Petersen and the letters and the applications seemed to indicate, erroneously, that it was Acting Assistant Attorney General Henry E. Petersen, rather than Attorney General Mitchell, who was authorizing the applications. Mr. Petersen's signature was affixed to these letters by Deputy Assistant Attorney General Harold P. Shapiro in accordance with the specific instructions of Mr. Petersen and the standard procedure of the Criminal Division.

Petitioners claim that the evidence from the wire interceptions should have been suppressed because the applications for the orders misidentified the officer who authorized the applications and thus violated 18 U.S.C. 2518(1)(a). Since the identical issue is before this

Court in *United States* v. *Giordano*, certiorari granted March 26, 1973, No. 72-1057, and *United States* v. *Chavez*, certiorari granted May 21, 1973, No. 72-1319, the Court may wish to defer disposition of the instant cases pending disposition of those cases.

2. Petitioners renew their claim, denied orally by the trial court (App. 168-185, 208), that the affidavits supporting the applications did not allege with the requisite specificity why normal investigative techniques had failed or appeared to be unlikely to succeed or, if tried, to be too dangerous. They also contend that the district court which authorized the wiretaps erred when it found, pursuant to 18 U.S.C. 2518(3)(c), that the application satisfied 18 U.S.C. 2518(1)(c).

The record shows that in his affidavits, Special Agent Zleit stated (App. 71-72, 136-137, 181-185); (1) that four confidential informants were "unwilling to give testimony against the defendants in any proceeding for fear of their personal safety," (2) that physical surveillance had been unproductive apart from showing that petitioners frequented two apartments and that further surveillance was not likely to produce any direct evidence of the gambing business which was conducted primarily over the telephone, and (3) that based on his experience investigating gambling operations, a search of the premises was not likely to furnish the necessary evidence to prove an offense since gamblers generally keep no permanent records, or destroy them before they can be seized. Agent Zleit's affidavits also showed (App. 57-59) that petitioners were involved in a large and complex gambling conspiracy about which the collection of information in exceedingly difficult. See *United States* v. *King*, 335 F. Supp. 523, 535 (S.D. Cal.), reversed on other grounds (C.A. 9), February 28, 1973, petition for

certiorari pending, No. 72-1320. These specific allegations amply satisfied the requirements of 18 U.S.C. 2518(1)(c). S. Rep. 1097, 90th Congress, 2d Sess.; 1968 U.S. Code Cong. & Adm. News, 2190; *United States* v. *Maineilo,* 345 F. Supp. 863, 874 (E.D.N.Y. 1972); *United States* v. *Lanza,* 349 F. Supp. 929, 933 (M.D. Fla. 1972).[2]

3. Petitioners Kessler and Hoffman contend that 18 U.S.C. 1955 is unconstitutional as a bill of attainder because it substitutes a legislative finding of probable cause for the required judicial finding, and because it includes a violation of state criminal laws as an element of the offense. Similar contentions were fully answered in our brief in opposition in *Palmer* v. *United States,* No. 72-2, October Term, 1972, certiorari denied, 409 U.S. 874;[3] we are providing petitioners with a copy of that brief.

4. Petitioners finally contend that they were improperly indicted and convicted for conspiring to violate 18 U.S.C. 1955. They claim that since the substantive offense requires the involvement of five or more persons as a jurisdictional element, under

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[2] Contrary to petitioners' claim, the issue raised here is not akin to that presented in *United States* v. *Irving Kahn and Minnie Kahn,* No. 72-1328, certiorari granted May 14, 1973. The question in *Kahn* is whether telephone conversations of the wife of the named subject of the interception were properly intercepted under a court order authorizing interception of conversations of the named subject "and others as yet unknown," where there had been no investigation whether Mrs. Kahn had also participated in the criminal conduct.

[3] Petitioners' contention that the statute creates a conclusive presumption of guilt under the state law is incorrect and contrary to the clear language of the statute. There is no claim here, nor was any raised below, that the evidence was insufficient to show that the gambling business was in violation of the New York statute.

"Wharton's rule"[4] no conspiracy to violate the statute may be charged. In our response in *Iannelli* v. *United States*, No. 73-64, we pointed out that since the substantive offense may be committed without a conspiracy being formed, each offense involves an element not required by the other, and it is therefore proper to charge and punish each separately.[5] Here, as in *Iannelli*, the indictment charged that more than the five persons necessary to constitute the substantive offense were involved in the conspiracy. Thus, Wharton's rule would not apply in any event, *United States* v. *Becker*, 461 F. 2d 230, 234 (C.A. 2), petition for certiorari pending, No. 72-158.

In *Iannelli*, we recognized, however, that there is a conflict between the circuits on this issue. In *United States* v. *Hunter*, petition for certiorari pending, No. 73-101, the Seventh Circuit declined to follow the decision in *Becker* and reversed a conviction for conspiring to violate 18 U.S.C. 1955.[6] We acquiesced in the

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[4] "An agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to necessarily require the participation of two persons for its commission." [Wharton's Criminal Law and Procedure, §89 (1957).]

[5] In the instant case the substantive count charging a violation of 18 U.S.C. 1955 was severed prior to trial and eventually dismissed, while in *Iannelli* the defendants were convicted of both the conspiracy and the substantive counts.

[6] The petitions for certiorari in *Becker* and in *Hunter* do not involve Wharton's rule. *United States* v. *Bobo* (C.A. 4), petition for certiorari pending *sub nom. Gray* v. *United States*, 73-231, is in accord with *Becker* and the decision below. Two district court cases in other circuits reached the same result as the court in *Hunter*. See *United States* v. *Figueredo*, 350 F. Supp. 1031 (M.D. Fla.), notice of appeal filed December 9, 1972; *United States* v. *Greenberg*, 334 F. Supp. 1092 (N.D. Ohio).

granting of certiorari in *Iannelli* because of the conflict in the circuits and the significance of this issue to the interpretation of 18 U.S.C. 1955.[7]

To the extent that this case charges a conspiracy to violate 18 U.S.C. 1955 it is like *Iannelli.* It differs from *Iannelli,* however, in that no accompanying substantive charge was before the court. Accordingly, there is no possibility here of the double punishment which Wharton's rule is designed to prevent. This case therefore involves a different facet of the problem involved in *Iannelli;* the Court may therefore wish to hear this case with *Iannelli* on the issue of the applicability of Wharton's rule only, reserving the issue concerning the authorization of the interceptions to be controlled by the decisions in *Giordano* and *Chavez.* Alternatively, the Court may wish to defer disposition of this petition until after the decision in *Giordano* and *Chavez.*

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1973.

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[7] We are providing petitioners with a copy of our brief in *Iannelli.*